United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

Affidavit

76-4141

To be argued by
ROBERT S. GROBAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-4141

HEINZ H. HEITLAND (A17 587 648)

and

H[illegible]NNELORE HEITLAND (A19 492 601)
Petitioners,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF AND ADDENDUM FOR RESPONDENT

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BRIEF FOR RESPONDENT

Preliminary Statement

Pursuant to Section 106 of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a, Heinz H. Heitland and Hennelore Heitland petition this Court for review of two final orders of deportation entered by the Board of Immigration Appeals ("Board"). The Board's first order, dated January 25, 1974: (1) reversed a finding by Immigration Judge Aaron I. Maltin that the Heitlands * were exempt from the labor certification require-

* All applications for discretionary relief submitted to the Service by Mr. Heitland will be considered to be submitted by Mrs. Heitland as well since she would benefit derivatively from the approval of any such application. 8 C.F.R. § 204.1.

ment of Section 212(a)(14), 8 U.S.C. § 1182(a)(14), because they were engaged in a commercial enterprise into which they had invested a substantial sum of money; (2) reinstated the Immigration Judge's finding that the Heitlands were deportable for having remained in the United States beyond their authorized stay; and (3) remanded the case to the Immigration Judge to determine whether the Heitlands were eligible for any statutory or discretionary relief from deportation (AR 147-148).*

The Board's second order, dated April 13, 1976, dismissed an appeal from a finding of the Immigration Judge at the remanded hearing that the Heitlands were ineligible for suspension of deportation pursuant to Section 244 of the Act, 8 U.S.C. § 1254.

It is the Immigration and Naturalization Service's ("Service") position that the petition for review should be dismissed because (1) this Court lacks subject matter jurisdiction to consider whether the Heitlands were entitled to adjustment of their status; (2) even if this Court had jurisdiction, the Heitlands failed to show that they were eligible for adjustment of status based upon the "Investor" exemption to the labor certification requirement of the Act; and (3) the Board properly held that the Heitlands were ineligible for suspension of deportation.

Issues Presented

1. Does this Court have subject matter jurisdiction to consider the issues raised in the petition for review with respect to the respondent's denials of petitioners' applications for adjustment of status?

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* References preceded by the letters "AR" are to the certified administrative record previously filed with this Court.

2. Did the respondent's denials of petitioners' applications for adjustment of status manifest abuses of discretion?

3. Are petitioners eligible for suspension of deportation?

Statement of the Case

Petitioner Heinz H. Heitland was born in Oldenburg, Germany on March 15, 1932 (AR 209). Subsequently, he married and moved to Canada where his first child was born (AR 75), and he became a naturalized Canadian citizen (AR 209). On February 7, 1962 Mr. Heitland was divorced from his wife by order of the Supreme Court of Ontario (AR 219). Today, Mr. Heitland's first wife and child reside in Canada (AR 45).

Petitioner Hennelore Heitland is a native and citizen of Germany (AR 213). She married Mr. Heitland on July 16, 1963 in Canada (AR 221) and accompanied him to the United States in 1968. At that time both Mr. and Mrs. Heitland were admitted to this country as non-immigrant visitors, authorized to remain less than six months (AR 184, 201-02). When their status expired, they did not depart or request permission from the Service to remain (AR 202). Instead, the Heitlands illegally moved to Brooklyn, New York and illegally obtained employment (AR 75, 84). It was in Brooklyn that Mr. Heitland's second child was born on July 14, 1969 (AR 11).

Shortly after the Heitlands began working and living in Brooklyn, an application was submitted to the Service to adjust Mr. Heitland's status to that of a permanent resident based on his employment as a mechanic (AR 198). However, in August, 1968 Mr. Heitland left his

job, purchased a truck, and started his own business, delivering letters and small packages in the New York City area (AR 175). Mr. Heitland's actions automatically cancelled the application for adjustment of his status since he was no longer engaged in the type of work or the job upon which it was submitted.[1] As a result, the application and supporting documents were returned to the applicant.[2] From the date on which Mr. Heitland

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[1] Section 245 of the Act, 8 U.S.C. § 1255, permits the Service in its discretion to adjust the status of an alien to that of an alien lawfully admitted for permanent residence if, *inter alia*, the alien is eligible to receive an immigrant visa. At the time this application was submitted, Mr. Heitland could have been eligible for only two types of visas: (1) a sixth preference visa pursuant to Section 203(a)(6) of the Act, 8 U.S.C. § 1153(a)(6); or (2) a non-preference visa pursuant to Section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8). However, for purposes of this review, it is irrelevant which type of visa was requested for Mr. Heitland since a condition precedent to the issuance of either was compliance with the labor certification requirement contained in both sections of the Act. In this regard Mr. Heitland could not be considered eligible for a visa unless a statement was submitted to the Secretary of Labor, pursuant to 29 C.F.R. § 60.3(c), providing a description of the job he was doing and certifying that he was needed to do the job. Accordingly, in August, 1968 when Mr. Heitland left his job and began delivering packages, he effectively abandoned his efforts for an adjustment of his status because he then had no one who could have submitted such a statement to the Secretary of Labor in support of the labor certificate he needed to be eligible for either a sixth preference or non-preference immigrant visa.

[2] The petitioners have claimed in their brief that Mr. Heitland assumed his application for adjustment of status was pending until December, 1970 because he had heard nothing from the Service to indicate otherwise (See petitioners' brief, at page 15). This contention is irrelevant to this action because Mr. Heitland's application was moot when he began delivering packages. In addition, an examination of the Service's administrative file reveals that all documents submitted to the Service in support of his application were returned in August, 1968.

began his delivery service, he obtained most of his delivery orders from the Mid-Island Messenger Company ("Mid-Island") which paid him sixty percent of the gross receipts it received for making these deliveries. However, in December, 1973 Mr. Heitland was injured in an automobile accident (AR 41). Since that accident he has been unable to drive or to maintain his relationship with Mid-Island (AR 37-8, 42). Consequently, he has been forced to support his family on the money he receives from his disability payments, his wife's salary, his real estate holdings[3] and his bank accounts,[4] rather than the profits of his delivery business (AR 26-30, 37-8, 42).

In December, 1970 the Heitlands and their daughter returned to Germany to visit relatives (AR 54). On this trip Mr. Heitland traveled on his Canadian passport which he had acquired in New York on October 20, 1970. Mrs. Heitland traveled with her German passport and their child traveled on her United States passport (AR 17-18). One month later while in Ger-

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[3] Mr. Heitland owns two parcels of real estate. One is located in Cape Coral, Florida and was purchased by Mr. Heitland for $3,600 in 1964 while he was a resident of Canada (AR 182). The other is located in Pennsylvania and was purchased for $2,000 in 1970 while Mr. Heitland was residing in Brooklyn (AR 42). There is nothing in the record to indicate if Mr. Heitland receives, or has received, any income from these properties. But he has made the unsubstantiated claim that the Florida parcel has tripled in value, and it is conceivable that he derives some income from that property or that he has sold part of it to support his family.

[4] Mr. Heitland has several bank accounts with deposits totalling near $10,000 from which he receives yearly interest of $500. (AR 26). However, he has borrowed against these accounts to finance his truck purchases, and his equity in them is only $3,000 (AR 27).

many, Mrs. Heitland applied for and obtained a non-immigrant visa which authorized her to return to the United States until August 3, 1971 (AR 179, 207, 234-5).

On February 4, 1971 the Heitlands came back to the United States from Germany. At this time Mrs. Heitland was admitted pursuant to her limited nonimmigrant visa, Mr. Heitland was admitted as a nonimmigrant in transit to Canada (AR 197-99),[5] and their child was admitted pursuant to her United States passport. The Heitlands have resided in Brooklyn since they returned from Germany in 1971.

On April 23, 1971 the Service instituted deportation proceedings against Mr. Heitland by order to show cause and notice of hearing. The order to show cause alleged that Mr. Heitland had entered the United States on February 4, 1971 with an intention to remain here indefinitely but without a valid immigrant visa or other entry document (AR 203). Mr. Heitland's deportation hearing was held on May 12, 1971 before Immigration Judge Aaron Maltin. At the beginning of the proceeding Mr. Heitland conceded his deportability by admitting the truth of the allegations contained in the order to show cause (AR 197). Then he submitted another application for adjustment of status. In his application Mr. Heitland claimed that he and his wife were currently eligible for non-preference immigrant visas[6] because his business made him exempt from the labor certification requirement of the Act (AR 198).[7] Con-

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[5] See 8 C.F.R. § 212.1(a) and (e)(1).

[6] Section 203(a)(8) of the Act, 8 U.S.C. § 1153(a)(8).

[7] *See* 8 C.F.R. § 212.8(b)(4). To insure that aliens would not supplant American workers from their jobs or fill careers available to these workers, Congress has mandated that every alien admitted

[Footnote continued on following page]

sideration of Mr. Heitland's application was deferred because the Judge noted its reference to Mrs. Heitland and wanted to give the Service sufficient time to ascertain her status (AR 202). He adjourned the hearing until that could be accomplished.

Subsequently, the Service instituted deportation proceedings against Mrs. Heitland by order to show cause and notice on hearing (AR 207). The order to show cause alleged that Mrs. Heitland had been admitted to the United States as a nonimmigrant visitor on February 4, 1971, that she was authorized to remain only until August 3, 1971, and that she had remained in this country beyond August 3, 1971 without authority.

On March 1, 1972 Judge Maltin reconvened the deportation proceeding initially commenced against Mr. Heitland and added Mrs. Heitland as a respondent. When questioned, she immediately admitted the truth of the allegations contained in the order to show cause issued against her and joined in her husband's renewed application for adjustment of status (AR 179-80). In

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to permanent residence as a non-preference immigrant comply with the labor certification requirement of the Act with certain exceptions. At this time 8 C.F.R. § 212.8(b)(4) contained one exception which provided that an alien would be exempt if he could demonstrate that he was engaged in a commercial enterprise into which he had invested, or was in the process of investing, a substantial amount of capital. The rationale behind this exception is apparent for an alien "investor" who has made a substantial commitment to an expanding commercial enterprise will create job opportunities, not threaten existing ones, and can be admitted to permanent residence in this country in a manner consistent with the Congressional purpose of safeguarding domestic employment opportunities (AR 145-46).

support of this application the Heitlands submitted to the Judge such documentary evidence as: their bank statement from Seaman's Bank for Savings which revealed a balance of $2,191.76 (AR 223), their 1970 Federal tax return which showed a net income from the delivery business of $4,074 (AR 224-31), and their two contracts for the purchase of vans allegedly used in the business (AR 232-33).[8]

On October 4, 1972 Judge Maltin found the Heitlands deportable as charged in the orders to show cause issued against them by the Service (AR 174-75). However, the Judge also found that the Heitlands were "investors" pursuant to 8 C.F.R. § 212.8(b)(4) and that they were eligible for adjustment of status relief (AR 177). This conclusion, and his opinion that the Service had been tardy in not adjusting Mr. Heitland's status pursuant to his 1968 application, persuaded the Judge

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[8] As the Board later noted, it is difficult to evaluate Mr. Heitland's actual investment in his delivery service from these contracts. While the purchase price of his first van was $2,703.97, Mr. Heitland paid only $703.97 of this amount and the remainder was supplied by the proceeds of an auto loan (AR 232). Similarly, his second truck cost $3,022.70, but Mr. Heitland only paid $250 at delivery and the balance of the purchase price was provided by the proceeds of another auto loan (AR 48, 233). Also there is no indication from the record to what use the first van was put when the second one was acquired. It could have been sold to pay off the outstanding loan and further offset the purchase price for the second van, or it could have been retained by the Heitlands for their personal use. In either event it is clear, contrary to the Heitlands' contention, that the combined purchase price of these vans, as well as the cost of a third one purchased later (AR 72-3), cannot be the standard by which their actual investment in their business is calculated.

that the Heitlands' application for adjustment of status should be granted as a matter of discretion (AR 177).*

On October 18, 1972 the Service appealed Judge Maltin's decision to the Board of Immigration Appeals. The ground asserted for the appeal was that the Judge's decision erroneously found the Heitlands to have the substantial investment in their business required by the regulations in effect at that time.[10] On January 25, 1974, after reviewing the entire record, the Board sustained the Service's appeal (AR 139-48). In its decision the Board reviewed the Congressional purpose behind the investor exemption, *i.e.*, that aliens admitted to permanent residence in this country not threaten existing domestic employment opportunities, and examined the Immigration Judge's decision to see if it was consistent with Congress' intention in this area and the regulations in effect when the Immigration Judge's decision was made (AR 146).[11] Based on this analysis

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[9] In basing his decision in part on his feeling that no substantial reason existed why Mr. Heitland had not had his application for adjustment of status considered prior to his 1970 departure to Germany, Judge Maltin apparently overlooked not only Mr. Heitland's change of employment shortly after the application was submitted (*see* footnote 1, *supra*), but also 8 C.F.R. § 245.2 (a) (3) which specifically provides that such an application will be considered abandoned if the applicant leaves the United States during its pendency without permission.

[10] While this appeal was pending, 8 C.F.R. § 212.8(b) (4), the regulation establishing the investor exemption from the labor certification requirement of the Act, was amended. See 38 Fed. Reg. 1380, January 12, 1973; 38 Fed. Reg. 8590, April 4, 1973. In summary, the amended regulation replaced the general substantial investment test with a two-fold criterion which required the alien to demonstrate that he had invested at least $10,000 in a commercial enterprise and that he had at least one year's experience in such an enterprise in order to qualify for the investor exemption.

[11] *Id.*

the Board concluded that the Heitlands had failed to demonstrate their right to investor status because the investment of $3,400, which the Immigration Judge found they had made in vans, was not substantial, because the business into which they invested was a marginal one, not likely to expand, create additional employment opportunities, or keep the Heitlands out of the domestic employment market, and because the delivery service business was already saturated with domestic workers who would be forced to compete with this additional business if the Heitlands were admitted to this country (AR 146-47). The Board recognized, however, that since the Immigration Judge had granted the Heitlands' initial application for relief from deportation, he had never considered whether they were entitled to any other discretionary relief and it remanded the case for further consideration (AR 147). No appeal was taken by the Heitlands from this decision.

On February 21, 1975 Judge Maltin reopened the Heitlands' deportation proceeding, pursuant to the Board's January 25, 1975 decision, to consider whether the Heitlands were eligible for discretionary relief from deportation. At the beginning of this hearing the Heitlands submitted two applications for different forms of discretionary relief. In the first, the Heitlands reapplied for adjustment of status and resubmitted all of the documentary evidence they had provided in support of their 1972 application as well as their 1973 and 1974 Federal tax returns (AR 108-19, 120-28), and an additional contract for the purchase of a 1973 van, executed shortly before the date of the hearing. In the second application the Heitlands applied for suspension of deportation pursuant to Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1), which provides for such relief, in

the Service's discretion, if the applicants can demonstrate: (1) that they had been physically present in the United States for a continuous period of not less than seven years immediately preceding their application; (2) that, during this period, they had exhibited good moral character; and (3) that their deportation would result in an extreme hardship to themselves or to their citizen child. In support of this application, the Heitlands presented their travel documents which showed that, with the exception of their return to Germany in 1970-71 (AR 78-83), neither had left the country without permission during the previous seven years, several letters from friends and neighbors which noted the Heitlands' good moral character (AR 84-8), and their testimony and applications which they claimed illustrated the alleged hardship they would suffer if deported (AR 23-24, 55-57).

On November 18, 1975 Judge Maltin rendered his written decision. In that opinion he discussed and denied the Heitlands' applications for adjustment of status (AR 17) and suspension of deportation (AR 18). With respect to the former, the Judge noted that Mr. Heitland had been injured in December, 1973, that he had been unable to work in his delivery service since that time, and that, as a result, he had been dependent upon his wife's salary (from her illegal job), his disability payments, and his other, non-business related, investments for his support. These factors, the Judge concluded, when combined with the Board's reasons for denying Mr. Heitland's previous application, left Mr. Heitland's argument in support of his application for adjustment of status "totally without any validity" (AR 17).

The Judge next denied the Heitlands' claim for suspension of deportation. In this regard he noted that in

order to qualify for this form of discretionary relief, the applicants initially had to establish seven years continuous physical presence in the United States (AR 17). This, the Judge concluded, could not be demonstrated by the Heitlands because their return to Germany in December, 1970, was not brief, innocent or casual since it required the Heitlands to obtain three passports to leave the United States and required Mrs. Heitland to obtain a nonimmigrant vistor's visa to return here (AR 18). Notwithstanding these conclusions, the Judge found the Heitlands eligible for the privilege of voluntary departure and granted it to them (AR 19). He also entered an alternative order of enforced deportation if the Heitlands failed to depart voluntarily within the time allotted (*Id.*).

On November 20, 1975 the Heitlands appealed Judge Maltin's second decision to the Board of Immigration Appeals. The sole basis for this appeal was the Judge's decision denying the Heitlands' application for suspension of deportation (AR 14). No appeal was taken from the Judge's decision denying the Heitlands' third application for adjustment of status.

On April 13, 1976 the Board dismissed the Heitlands' second appeal. In this decision the Board affirmed the Immigration Judge's conclusion that the Heitlands' six week trip to Germany was neither brief nor casual but was purposely and meaningfully interruptive of the seven year presence requirement of Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1).

After the Board's decision, the Heitlands did not depart voluntarily. Consequently, the Service issued warrants of deportation against them on May 20, 1976 pursuant to the Immigration Judge's alternative order

of deportation (AR 1, 2). On June 4, 1976 the Heitlands filed their petition for review of the Board's January 25, 1974 and April 13, 1976 decisions. The Heitlands have since remained in the United States pursuant to the automatic statutory stays of deportation which accompany petitions filed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statutes

Immigration and Nationality Act, § 106, 66 Stat. 163 (1952), as amended, 8 U.S.C. § 1105a:

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1942 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that—

(1) a petition for review may be filed not later than six months from the date of the final deportation order or from the effective date of this section, whichever is the later.

* * * * *

(4) except as provided in clause (B) of paragraph (5) of this subsection, the petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive;

* * * * *

(c) An order of deportation or of exclusion shall not be reviewed by any court if the alien has not exhausted

the administrative remedies available to him as of right under the immigration laws and regulations. . . .

* * * * *

Immigration and Nationality Act, § 203, as amended, 8 U.S.C. § 1153:

(a) Aliens who are subject to the numerical limitations specified in section 1151(a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

* * * * *

(6) Visas shall next be made available, in a number not to exceed 10 per centum of the number specified in section 1151(a) (ii) of this title, to qualified immigrants who are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States.

* * * * *

(8) Visas authorized in any fiscal year, less those required for issuance to the classes specified in paragraphs (1) through (6) and less the number of conditional entries and visas made available pursuant to paragraph (7), shall be made available to other qualified immigrants strictly in the chronological order in which they qualify. Waiting lists of applicants shall be maintained in accordance with regulations prescribed by the Secretary of State. No immigrant visa shall be issued to a nonpreference immigrant under this paragraph, or to an immigrant with a preference under paragraph (3) or (6) of this subsection, until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 1182(a) (14) of this title.

* * * * *

Immigration and Nationality Act, § 244, as amended, 8 U.S.C. § 1254:

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

Immigration and Nationality Act, § 245, as amended, 8 U.S.C. § 1255(a):

(a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

* * * * *

ARGUMENT

POINT I

This Court Lacks Subject Matter Jurisdiction To Consider Whether Respondent's Denials Of Petitioners' Applications For Adjustment Of Status Were Made In An Arbitrary Or Capricious Manner.

Since 1968, when the Heitlands initially entered the United States together, they have submitted to the Service three separate applications for adjustment of status. The first application, based on Mr. Heitland's employment as a mechanic, was submitted shortly after they arrived and was abandoned by Mr. Heitland in August, 1968 when he left the type of employment or job upon which it was based. In this appeal the Heitlands have elected to focus the Court's attention on the denial of their later two applications, based on Mr. Heitland's alleged "investor" status, which the Heitlands claim were denied by the Service in an arbitrary or capricious manner.[12] The respondent submits that a brief review of the procedural history surrounding these applications will demonstrate that this Court lacks subject matter jurisdiction to consider the Heitlands' contentions.

The Heitlands' second application for adjustment of status was submitted to the Immigration Judge at the Heitlands' consolidated hearing on March 1, 1972. It was considered by the Judge and granted in his written decision dated October 4, 1972. On October 18, 1972 the Service filed a notice appealing the Judge's decision to the Board of Immigration Appeals which, on January

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[12] The Heitlands have also asked this Court to review the Service's denial of their applications for suspension of deportation and this issue is discussed in Point III, *infra*.

25, 1974, reversed the Immigration Judge and denied the Heitlands' second application. No appeal was taken to this Court within six months of that decision.

Section 106(a)(1) of the Act, 8 U.S.C. § 1105a(a)(1), provides that "a petition for review may be filed not later than six months from the date of the final deportation order. . . ." If such a petition is filed after the six month period has expired, the Court of Appeals lacks subject matter jurisdiction to consider whatever claims are included in the petition. *Gena* v. *Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970); *United States ex rel. Tanfara* v. *Esperdy*, 347 F.2d 149 (2d Cir. 1965). In their petition the Heitlands request that this Court review the propriety of the Board's January 25, 1974 decision. This decision, denying their application for a discretionary relief, constituted a final order subject to this Court's review. *Foti* v. *Immigration and Naturalization Service*, 375 U.S. 217 (1963). Accordingly, the Heitlands' failure to petition for review until two and one-half years after the Board's order precludes this Court from considering the merits of the claims raised in the petition that are based on the Board's January 25, 1974 decision.

The Heitlands might contend that the Board's decision was not a "final order" since the case was remanded to the Immigration Judge for further consideration. However, at the remanded hearing, the Heitlands submitted a third application which included the evidence they had presented in support of their second application and which the Immigration Judge also denied.[13] The Heit-

[13] The regulation establishing the "investor" status had been amended by the Service while the Heitlands first appeal to the Board was pending (See footnote 10, *supra*). Thus, the Heitlands knew, when they submitted their third application on February 21, 1976, that it would be considered on the basis of the criterion

[Footnote continued on following page]

lands did not appeal that denial to the Board of Immigration Appeals, choosing to present to the Board only the issue of whether their application for suspension of deportation had been properly denied (AR 14). Consequently, they failed to exhaust their administrative remedies with respect to their third application for adjustment of status as well and this Court lacks subject matter jurisdiction to consider any claims of impropriety arising from the Service's denial of either application. Section 106(c) of the Act, 8 U.S.C. § 1105a(c); *Luna-Benalcazar* v. *Immigration and Naturalization Service*, 414 F.2d 254 (6th Cir. 1969); *Arias-Alonso* v. *Immigration and Naturalization Service*, 391 F.2d 400 (5th Cir. 1968); *Rodriguez-DeLeon* v. *Immigration and Naturalization Service*, 324 F.2d 311 (9th Cir. 1963). As the Court in *Rodriguez-DeLeon* succinctly stated:

> "Petitioner seeks review of a final order of deportation. He did not, however, exhaust his administrative remedies by appeal to the Board of Immigration Appeals. Under these circumstances, his petition must be dismissed. Siaba-Fernandez v. Rosenberg, 9 Cir. 1962, 302 F.2d 139; Murillo-Aguilera v. Immigration and Naturalization Service, 9th Cir., 1963, 313 F.2d 141." *Rodriguez-DeLeon* v. *Immigration and Naturalization Service*, *supra*, at 312.

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set forth in the recent amendments. Nevertheless, the Heitlands elected to present their third application to the Immigration Judge. Since the documentary and testimonial evidence submitted in behalf of this application included all of the evidence which had been presented to the Judge in the second application (AR 53), the third application should be considered by this Court to have superceded the second one for the purposes of this appeal, and the Heitlands should be considered to have abandoned whatever rights they still retained with respect to the appealability of the second application by their submission to the Judge of the third application.

Therefore, respondent respectfully requests that the petition for review of the Service's denial of the Heitlands' applications for adjustment of status be dismissed.

POINT II

The Service's Denials Of The Heitlands' Applications For Adjustment Of Status Represented Proper Exercises Of Discretion.

Even if this Court had jurisdiction to consider the Heitlands' claims, that the Service's denial of their second and third applications for adjustment of status manifested an abuse of discretion, a brief examination of these claims, and the policy underlying the Service's denial of the Heitlands' applications, will demonstrate the propriety of the Service's decisions.

In 1965 Congress amended the Act by making the labor certification requirements present in Section 212(a)(14) more demanding. This action represented a Congressional awareness of the increasing pressures placed upon the American labor market by the influx of foreign labor into this country, and manifested Congress' resolve to safeguard existing and future domestic employment opportunities for those lawfully residing in this country.[14]

In response to Congress' action, the Attorney General, through the Service, promulgated regulations, consistent with Congress' purpose, which provided specific exemptions to the more rigorous labor certification requirement of the Act in instances where the Service concluded that

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[14] *See* 1952 U.S. Code Cong. & Adm. News 3333-34.

the admission of a certain type of alien would not adversely affect the domestic labor market. One of these exemptions was the "Investor" exemption contained in 8 C.F.R. § 212.8(b)(4).[15]

As the most recent amendments to this provision reflect, the investor exemption was formulated to enable

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[15] This exemption was inserted into the regulations by 31 Fed. Reg. 10021, July 23, 1966 and initially read as follows:

> The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require labor certification:
>
> * * * *
>
> (4) An alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

It was amended in pertinent part by 38 Fed. Reg. 1380, January 12, 1973 to read:

> (b) *Aliens not required to obtain labor certification* . . .
> (4) an alien who establishes . . . that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totaling at least $10,000, and who establishes that he has at least 1 year's experience or training qualifying him to engage in such enterprise.

On September 7, 1976 this regulation was further amended by 41 Fed. Reg. 37575 to read:

> [(4)] an alien who establishes . . . that he is seeking to enter the United States for the purpose of engaging in an enterprise in which he has invested, or is actively in the process of investing, capital totaling at least $40,000, in which enterprise he will be a principal manager, and that the enterprise will employ persons in the United States who are United States citizens or aliens lawfully admitted for permanent residence, exclusive of the alien, his spouse and children. September 7, 1976. Effective October 7, 1976.

The evolution of the present regulation clearly demonstrates the Attorney General's response to the Congressional mandate that aliens admitted to permanent residence in this country not enter the domestic labor market but rather add to that market.

aliens to establish domestic enterprises that would increase the employment opportunities available in this country, if these enterprises were of sufficient magnitude to insure that the alien would be able to support his family from the busines without entering the labor market (AR 146-48). (*See* 41 Fed. Reg. 37575, September 7, 1976). It was pursuant to this regulation that the Heitlands' second and third applications were submitted to the Service and it is against the purpose behind this regulation, as well as the language of the regulation itself, that the propriety of the Service's denials of these applications must be judged [16] to ascertain if they are supported by "reasonable, substantial, and probative evidence. . . ." [17]

To support his second application for adjustment of status [18] Mr. Heitland submitted several documents to the Court. These included his 1970 Federal income tax re-

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[16] During the pendency of the Heitlands' appeal from the decision of the Immigration Judge dated October 4, 1972, 8 C.F.R. § 212.8(b)(4) was amended to provide a more specific criterion against which alien claims for adjustment of status, based on "investor" exemptions, were to be judged. Similarly, during the pendency of this appeal, 8 C.F.R. § 212.8(b)(4) has again been amended to increase the barriers to aliens desirious of obtaining this exemption. (See footnote 13, *supra*).

For clarity, the respondent will adhere to the Service's interim decision No. 2201, *Matter of Ko* (see addendum to Respondent's brief), and consider the Heitlands' eligibility for adjustment of status, based on their "investor" qualifications, under whichever regulation is more favorable to them at the time their application is pending.

[17] The standard for review of a decision of the Board is set forth in Section 106(a)(4) of the Act, 8 U.S.C. § 1105a(a)(4). It provides that the Board's decision "if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive". *Yaldo* v. *Immigration and Naturalization Service*, 424 F.2d 501 (6th Cir. 1970).

[18] This application was submitted at the March 1, 1972 hearing.

turn, which revealed a net profit from his business of $4,075 for that year (AR 224), a certified statement from his bank, which showed a current balance of $6,312.76 that the Bank held as security for a $4,211 auto loan, and two purchase contracts for the Volkswagon vans which he allegedly used in his business.[19] In addition, Mr. Heitland testified that his business would expand if his immigration problems were clarified and that his status should have been adjusted by the Service pursuant to his first application in 1968 (AR 200).[20]

Based on the evidence adduced at the hearing, and his mistaken belief that the Service had prejudiced Mr. Heitland by failing to adjust his status in 1968, the Immigration Judge granted his application (AR 177). On appeal this decision was reversed by the Board of Immigration Appeals which concluded that Mr. Heitland's investment was not a substantial one[21] if examined in light of the Congressional purpose behind the "investor" exemption. The Heitlands have challenged this decision in this appeal and contend that it is not supported by substantial evidence.

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[19] See footnote 8, *supra*.

[20] As set forth in footnote 1, *supra*, there is no basis for this assertion. Mr. Heitland purposefully and voluntarily abandoned his application in August, 1968 when he left his job and established his own business, and in December, 1970 when he returned to Germany. 8 C.F.R. § 245.2(a)(3).

[21] The Board examined Mr. Heitland's application pursuant to the substantial investment test contained in the regulations until January 12, 1973. This test was used, because, under the *Ko* criteria discussed in footnote 16, *supra*, it was considered more favorable to Mr. Heitland. Since the Heitlands have not challenged that decision in this appeal, respondent's discussion of this decision shall also be in terms of the substantial investment test used by the Board.

As the evidence presented by Mr. Heitland demonstrated, Mr. Heitland's business is, at best, a marginal one. His net profits for 1970 amounted to only $4,075 and this amount had increased to only $4,621 by 1972 (AR 93). Also, his investment in this business was insubstantial. While he had purchased two trucks, his actual cash investment in these automobiles was less than $1,000. (AR 232-33). In this regard the Heitlands have argued in their brief that this size investment was approved by the Board in *Matter of Finau*, 12 I & N Dec. 86 (1967) (See Addendum). However, in that case the alien's $1,000 investment in his trucks and equipment was coupled with outstanding construction contracts valued at $30,000 which the Board concluded represented an ongoing, substantial enterprise. The Heitlands insisted at their hearing that Mr. Heitland's real estate holdings and bank accounts complement his financial picture in the same way. But, as the Board found, the additional resources approved by the Board in *Matter of Finau* were all related to that alien's initial investment and were all components of his business. In Mr. Heitland's situation the outside capital to which he referred had nothing to do with his business and, as a result, could not have constituted evidence of an ongoing, substantial commercial enterprise that would support the Heitlands and contribute to the American economy. The evidence before the Board showed that, since its inception, Mr. Heitland's delivery service had demonstrated no growth potential and had been heavily encumbered by debt obligations arising from the purchase of the two vans. There was no evidence introduced to show that the business would survive, much less succeed, or that it would create additional employment opportunities for domestic workers. In fact, based on the record at this juncture, the Board reasonably could have concluded that once Mr. Heitland consumed his out-

side capital to support his family while his business floundered, he would have to abandon his effort to establish his own business and seek employment. Thus, the Board's determination denying Mr. Heitland's second application for adjustment of status was consistent with Congress' efforts to protect the American labor market and was supported by the evidence.[22]

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[22] The Heitlands have argued in their brief that they were "misled" by what they considered the Board's abandonment in this case of the standards it established in *Matter of Ko* to evaluate investor exemption applications where the investor assumed additional responsibilities in the business. (See Petitioners' brief at page 14). Specifically, they allege that the Board's conclusion in this case, that because Mr. Heitland drove his van he was primarily engaged in skilled or unskilled labor for which he needed a labor certificate, is inconsistent with its conclusion in *Matter of Ko* and they urge this Court to remand this case to resolve this inconsistency. The facts involved in *Matter of Ko* belie this assertion.

In *Matter of Ko* the Board considered an "investor" application from an alien who had invested $18,000 in a retail shoe store and who also managed and operated the store. The District Director had denied the application because he felt the alien was primarily engaged in the type of work for which a labor certificate was needed. The Board reversed that decision and granted the application. In its opinion the Board noted the substantial amount of this alien's investment, the Congressional purpose behind the investor exemption and Section 212(a)(14) of the Act, and the fact that this business was expanding and employed two American residents. Based on these facts, it concluded that:

> "it is not unreasonable to conclude that it was not the purpose of Congress . . . to discourage an alien's bona fide effort to establish and conduct his own business here, where his stake in that business is to be substantial and irrevocably committed, and where there are encouraging prospects for its success. . . . His employment in his own business is not the 'job competition' which the Congress wished to protect against. His conduct of his business does not 'replace a worker in the United States' or 'adversely affect the wages and working conditions of individuals in the United States similarly employed.' His efforts have in fact created jobs for two American residents."

[Footnote continued on following page]

The Heitlands' claim for investor status was not advanced by the evidence introduced in their remanded February 21, 1975 hearing to support their third and final application for adjustment of status. In summary, the facts developed at that hearing revealed that Mr. Heitland's income from his business had fallen from $4,621 in 1972 to nothing in 1974 (AR 121) due to an injury he suffered in an automobile accident and that, as a result of this injury, he could not longer maintain or develop the delivery service upon which his application for investor status was based (AR 37-8, 42). In addition, Mr. Heitland admitted, as his tax returns had indicated, that he only was able to support his family from the salary his wife earned in her illegal job and from the small disability payments he received (AR 26-30, 37-38, 42), and that he might have to make support payments out of this small sum to his first wife and child (AR 44-5). These facts, examined against the Congressional purpose behind Section 212(a)(14) of the Act and the "investor" exemption to that section, clearly supported the Immigration Judge's conclusion that this final application was "totally without any validity" (AR 17) and the Heitlands' decision not to appeal that result to the Board is understandable. Accordingly, the respondent respectfully requests that the petition for review of the Service's denials of the Heitlands' applications for adjustment of status be dismissed.

The factual distinctions between *Matter of Ko* and this case are obvious and need not be belabored. The Board's conclusion in this case is consistent with its decision in *Matter of Ko* as well as Congress' purpose and the Heitlands' contentions in this regard are without merit.

POINT III

The Heitlands Are Ineligible For The Discretionary Relief Of Suspension Of Deportation Authorized In Section 244(a)(1) Of The Act.

Section 244 (a) (1) of the Act, 8 U.S.C. § 1254 (a) (1) provides that the Attorney General, through the Service, may suspend the deportation of an alien who, *inter alia*, has been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application, . . . and is a person whose deportation would . . . result in extreme hardship to the alien or to his . . . child, who is a citizen of the United States. . . ." To be eligible for this relief, an alien has the burden of proving compliance with these provisions. *Rassano* v. *Immigration and Naturalization Service*, 492 F.2d 220 (7th Cir. 1974); *Ex parte Orlando*, 131 F. Supp. 485 (S.D.N.Y.) *aff'd*, 222 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 862 (1954).

At the February 21, 1975 hearing, which the Board ordered be held to consider whether the Heitlands were eligible for discretionary relief from deportation, the Heitlands submitted to the Service their applications for suspension of deportation but failed to sustain their burden of showing compliance with the quoted provisions of Section 244(a)(1) of the Act. As a result these applications were denied by the Immigration Judge whose decision was affirmed by the Board of Immigration Appeals on April 13, 1976. The Heitlands filed a petition to review these decisions and contend that they were inconsistent with judicial interpretations of the pertinent portions of Section 244(a)(1) and the ameliorative purpose behind this section. The Service submits that the Board's conclusion, both with respect to whether the

Heitlands have continuously resided in this country for seven years and to whether they will suffer extreme hardship if they were forced to leave, was proper and should not be set aside by this Court.

A. The Heitlands have not been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of their applications.

At their February 21, 1975 hearing, the Heitlands admitted that they returned to Germany in December, 1970 and remained there for over six weeks until February 4, 1971 when they were readmitted to the United States as noimmigrant visitors authorized to remain a limited time.[23] As a result they have not been

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[23] At page 16 of their brief the Heitlands remark that the Service inspector who readmitted them into the United States "obviously . . . knew they were not coming in as visitors since they were travelling with their United States citizen child, and they were returning to their residence in Brooklyh (sic), where they had lived for many years." This is clearly an unwarranted series of assumptions. Mrs. Heitland was entering the United States pursuant to a nonimmigrant visitor's visa which had been issued to her less than one month prior to their arrival in the United States. There was no reason for the Service inspector to challenge her entry at this time, even with the presence of her citizen child, because she held a valid, nonimmigrant visa, a German passport, and was traveling with a Canadian citizen whose entry without a visa was permitted to enable him to return to Canada. (See 8 C.F.R. § 212.1(a) and (e)). Moreover, the fact that she was traveling on a German passport and a nonimmigrant visa were testimony to her German domicil since the visa could not have been issued to her if she had revealed an American address on the application. (*See* Gordon and Rosenfield, *Immigration Law and Procedure*, Section 3.10). Similarly, the Service inspector had no reason to challenge Mr. Heitland's re-entry into this country when that re-entry was permitted solely to enable him to return

[Footnote continued on following page]

physically present in the United States for the last seven years and are ineligible for suspension of deportation.

While conceding their six week absence, the Heitlands claim, however, that it was brief, casual and innocent and did not constitute an interruption of the physical presence requirement of Section 244(a) of the Act. In support of this contention the Heitlands rely on *Rosenberg* v. *Flueti*, 374 U.S. 449 (1963), and its progeny which they argue support their claim that their return to Germany did not interrupt their continuous presence in this country for the purposes of Section 244(a)(1).

In *Rosenberg* v. *Flueti* the respondent was a resident alien who was found deportable under Section 212(a)(4) of the Act on the ground that he had entered the United States afflicted with a psychopathic personality. The respondent claimed that his brief trip to Mexico and subsequent arrival in the United States did not constitute an "entry" into this country since he had only crossed the border "for a couple hours." The United States Supreme Court, in a 5-4 decision, concluded that:

> "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return." *Rosenberg* v. *Flueti*, *supra*, at 462.

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to the country on whose passport he traveled. In this light, the Heitlands' contention that the Service admitted them to the United States with knowledge of their "residence" here is without merit. At the time of their entry on February 4, 1971, the Service had no reason to suspect the Heitlands of returning to live in the United States because the travel documents they carried did not reflect that illegal intent.

The Supreme Court's conclusion in *Flueti*, has been relied upon by the Courts of the Ninth Circuit to justify the granting of suspension of deportation relief to deportable aliens who have failed to comply with the seven years continuous residence requirement due to brief trips to Mexico. For example, in *Wadman* v. *Immigration and Naturalization Service*, 329 F.2d 812 (9th Cir. 1964), the Court found that an alien's five day trip to Mexico was brief, innocent and casual and did not disrupt the continuity of residence required to be eligible for suspension of deportation. This conclusion was followed in *Git Foo Wong* v. *Immigration and Naturalization Service*, 358 F.2d 151 (9th Cir. 1966), where the Court found that an alien's two hour visit to Mexico should not be regarded as meaningfully interruptive of his continuous presence in the United States. However, even the Ninth Circuit has not extended the results reached in *Wadman* and *Git Foo Wong* to those situations where the interruption of residence is meaningful and the subsequent reentry accomplished by purposes inconsistent with the policies of the Act. *Barragan-Sanchez* v. *Rosenberg*, 471 F.2d 758 (9th Cir. 1972).

As the Immigration Judge found when he denied the Heitlands' application for suspension of deportation, the six week trip involved in this case was not the brief, innocent and casual kind of excursion approved in *Wadman* and *Wong*. It required the Heitlands to obtain three different passports and to travel many thousands of miles. It also required Mrs. Heitland to assert a German residence to obtain a nonimmigrant visa with which to return to the United States. These factors clearly demonstrate that the Heitlands' return to Germany was not the brief, casual, emergency trip they have claimed. Rather, the deliberate efforts by Mrs. Heitland to evade

the immigration provisions of the Act show an intentional disruption of residence, inconsistent with the policies of the Act, and make the Heitlands ineligible for suspension of deportation relief on this basis.

B. Deportation of the Heitlands will not result in extreme hardship to them or their child.

Assuming *arguendo* that the Heitlands could comply with the seven year continuous physical presence requirement of Section 244(a)(1), they still did not establish that their deportation would result in extreme hardship to themselves or to their child. At their February 21, 1975 hearing the Heitlands initially claimed that their deportation would result in an economic hardship to them.

But the courts consistently have refused to regard even significant economic dislocations caused by deportation as sufficient grounds to reverse the Service's conclusion that no extreme hardship has been demonstrated. *Peleaz* v. *Immigration and Naturalization Service*, 513 F.2d 303 (5th Cir. 1975); *Yong* v. *Immigration and Naturalization Service*, 459 F.2d 1004 (9th Cir. 1972). The Heitlands' prospective loss in this case, namely their abandonment of Mr. Heitland's marginal business and Mrs. Heitland's illegal employment, is not of sufficient magnitude to challenge the Service's conclusion that no extreme hardship would result from their deportation.

Similarly, the Heitlands' alternative claim, that their child would suffer an extreme hardship from their deportation, is also an insufficient showing of extreme hardship. While this child is a citizen and has a right to remain in the United States, she has no constitutional or statutory right to remain in this country with her

parents. *Gonzales-Cuevas* v. *Immigration and Naturalization Service*, 515 F.2d 1222 (5th Cir. 1975); *Silverman* v. *Rogers*, 437 F.2d 102 (1st Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); *Faustino* v. *Immigration and Naturalization Service*, 302 F. Supp. 212 (S.D.N.Y. 1969), *aff'd*, 432 F.2d 429 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *Montesdeoca* v. *Kiley*, 76 Civ. 2981 (S.D.N.Y. September 8, 1976). Furthermore, any hardship she might suffer from her parents' deportation would not be sufficient to enable her fortuitous birth in this country to confer any additional immigration benefits on the Heitlands. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 (1957); *Perdido* v. *Immigration and Naturalization Service*, 420 F.2d 1179, 1181 (5th Cir. 1969); *Montesdeoca* v. *Kiley*, *supra*; *Dimaren* v. *Immigration and Naturalization Service*, 398 F. Supp. 556 (S.D.N.Y. 1974). The courts consistently have affirmed, as proper exercises of discretion, the Service's decisions to deny discretionary relief to illegal aliens with citizen children. *Hintopoulos* v. *Shaughnessy*, *supra*; *Williams* v. *Immigration and Naturalization Service*, 76-4015 (2d Cir. September 16, 1976); *Perdido* v. *Immigration and Naturalization Service*, *supra*. As the Court stated in *Gonzales-Cuevas* v. *Immigration and Naturalization Service*:

> "Two things are clear: (1) Legal orders of deportation do not violate any constitutional right of citizen children . . . ; (2) Petitioners' violations of the immigration laws create no extraordinary rights in them, directly or vicariously through their citizen children, to retain their illegally acquired status in this country . . . . ." *Gonzales-Cuevas*, *supra*, at 1224.

The evidence submitted to the Service clearly did not support the Heitlands' contention that they were entitled

to the discretionary relief of suspension of deportation. To the contrary the evidence revealed that the Heitlands were unable to comply with two of the statutory prerequisites needed to be eligible for such relief. Therefore the respondent respectfully requests this Court to sustain the Board's decisions and to dismiss the petition for review.

CONCLUSION

The petition for review should be dismissed.

Dated: New York, New York
September 23, 1976

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for Respondent.

ROBERT S. GROBAN, JR.,
MARY P. MAGUIRE,
Special Asistant United States Attorneys, Of Counsel.

ADDENDUM

Matter of Finau

A-13054549

Decided by Board February 10, 1967

Although respondent's business is that of an independent landscape contractor, since the evidence shows he is skilled and qualified in authentic Polynesian construction; remodels and redecorates restaurants with Hawaiian-style thatch roofs; has contracts for the construction of canoe houses, native houses, and buildings of historical interest amounting to approximately $30,000; has an original investment of more than $1,000 in trucks and other equipment and employs one person in his business, he comes within the exception of 8 CFR 212.8(b)(4) as "an alien who will engage in a commercial . . . enterprise in which he had invested or is actively in the process of investing a substantial amount of capital"; therefore, he is exempt from the labor certification requirement of section 212(a)(14) of the Immigration and Nationality Act, as amended.

CHARGE:

Order: Act of 1952—Section 241(a)(9) [8 U.S.C. 1251(a)(9)] Failed to comply with conditions of non-immigrant status.

ON BEHALF OF RESPONDENT:
Donald L. Ungar, Esquire
220 Bush Street
San Francisco, Calif. 94104
(Brief submitted)

ON BEHALF OF SERVICE:
Irving A. Appleman
Appellate Trial Attorney
(Oral argument)

Matter of Finau

The special inquiry officer, in a decision dated October 5, 1966, grants the respondent's application for adjustment of status under section 245 of the Immigration and Nationality Act and certifies his order for final decision of the Board of Immigration Appeals.

Respondent, a married male alien, 44 years of age, is a native and citizen of Tonga. He was admitted to the United States as a student on September 5, 1962. It is conceded that he is deportable as charged in the order to show cause.

The respondent's application for relief under section 245 of the Immigration and Nationality Act is concerned with the issue of whether he is required to submit a certification from the Secretary of Labor pursuant to section 212(a)(14) of the Immigration and Nationality Act, as amended. This issue was before us when we last considered the case on August 4, 1966. We noted on that occasion that the special inquiry officer's conclusion that the respondent is not required to have a labor certification because he was self-employed was rendered prior to the publication on July 23, 1966 of regulations setting forth the classes of aliens exempted from obtaining a certification (31 Fed. Reg. 10021, 8 CFR 212.8(b)). We remanded the case to the special inquiry officer for consideration of what effect, if any, the published regulation would have on respondent's application for adjustment of status and to enable the Immigration Service and respondent to make such further representations as they desire.

The facts of the case are fully stated in the special inquiry officer's opinion of May 13, 1966. They establish that the respondent violated his student status by engaging in employment as a yardman earning $350 per

month. Since 1964 the respondent has been engaged in landscaping enterprises as an independent contractor. According to the record, he has invested more than $1,000 in equipment to carry on this business. He advertises in newspapers and makes estimates upon request by prospective customers. He undertakes the project after the price has been agreed upon. He builds and thatches native buildings in Hawaii which are of particular value to those interested in attracting tourists.

The record contains evidence that the respondent has unique skills in the area of authentic Polynesian construction and that these skills do not in any way compete with the available skills of United States citizens (Ex. 4). There is also evidence that the respondent is the only independent contractor qualified in Polynesian construction that could be obtained by the operator of a large tourist attraction (Ex. 4). He also remodels and redecorates restaurants with Hawaiian-style thatch roofs. He employs a resident alien in his construction business. It is alleged that he has offers of contracts for similar construction and redecorating.

Section 212(a)(14) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(14) as amended by the Act of October 3, 1965, provides in part that an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified and available at the time of application for a visa and admission to the United States to perform such labor at the place to which the alien is destined and (B) the employment of such aliens will not adversely affect the wages and work-

ing conditions of workers of the United States similarly employed, 8 CFR 212.8(b) interprets what amounts to the performance of skilled or unskilled labor referred to in Section 212(a)(14) (*supra*). It reads in pertinent part: "The following members are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: . . . (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital; . . ."

The foregoing regulations raises the issue of what amounts to a "substantial amount of capital." The special inquiry officer is of the opinion that the term refers to an amount of capital which is substantial according to the enterprise under consideration, and that the term is not restricted to a monetary amount. The special inquiry officer concludes that the respondent has invested a substantial amount of capital for his particular business since the evidence establishes that he (respondent) has contracts for the construction of canoe houses, native houses, and buildings of historical interest amounting to some $30,000 or more; that the respondent has the equipment, the know-how, and the facilities to carry on this commercial enterprise and that his original investment now amounts to considerably more than $1,000 in trucks and other equipment.

The Service takes the position that an alien who organizes and creates a commercial enterprise of his own with a small investment of capital that he has earned by performing skilled or unskilled labor cannot avoid the exclusion provisions of section 212(a)(14) unless the alien proves by tangible evidence that his business was established in good faith and that he has the ability

and resources to continue and expand the enterprise. The Service maintains that there is no substantial evidence of record that the respondent is conducting a business of the magnitude that he alleges. The Service argues that there is only the respondent's testimony that he has contracts amounting to some $30,000 or more. The Service doubts the respondent's testimony that his investment has been steadily increased since he went into business. The Service seeks a remand of the case for aditional evidence of the operation and volume of business the respondent now has.

We find no basis for a remand of the case to the special inquiry officer. The record contains sufficient evidence for a decision on the merits. Our order of August 4, 1966 afforded the Service and the respondent an opportunity to reopen the proceeding for aditional evidence. The Service, on August 30, 1966 and the respondent on August 25, 1966, advised the special inquiry officer that they had no objection to his consideration of the case without further hearing. The case has been pending since the order to show cause was issued in December of 1963. Evidence of the volume now grossed by the respondent is not essential for a final disposition of the issue before us.

8 CFR 212.8(b)(4) does not define the terms "commercial or agricultural enterprise" and "substantial amount of capital." We agree that an alien who seeks an exemption from the labor certification requirement of section 212(a)(14) has the burden of establishing his good faith intention of engaging in that enterprise and his ability and resources to carry on the contemplated enterprise. The test of the alien's ability and resources to carry on the contemplated enterprise can not be meas-

ured by hard and fast rules or by the amount of capital he invests in the undertaking. It will vary with the nature of the enterprise. Whether the contemplated enterprise will be one that has a reasonable chance of success can not be tested in every case by the alien's ability or resources. There are certain risk factors associated with the establishing of any commercial or agricultural enterprise. We do not agree with the Service's argument that a laboring background should be considered as a factor in judging the respondent's ability to carry on in his chosen field. This also would vary with the nature of the enterprise. There are many successful enterprises in the building industry which were established by men with laboring backgrounds.

The special inquiry officer concludes that as a matter of law the respondent has met the burden of establishing that he is an alien who is engaged in a commercial enterprise in which he has invested a substantial amount of capital and therefore comes within the exception of 8 CFR 212.8(b)(4). We affirm this conclusion. The respondent is eligible to receive an immigrant visa as he is exempted from procuring a labor certification by the provisions of 8 CFR 212.8(b). Since it appears that an immigration visa is currently available under the quota of Tonga, we affirm the approval of the respondent's application for an adjustment of status pursuant to the provisions of section 245 of the Immigration and Nationality Act. The Service request to remand the case to the special inquiry officer will be denied. An appropriate order will be entered.

ORDER: It is directed that the order entered by the special inquiry officer on October 5, 1966 be and the same is hereby affirmed. The Service request to remand the case to the special inquiry officer is hereby denied.

Matter of KO

Interim Decision #2201

A-19892048

Decided by Deputy Associate Commissioner May 9, 1973

(1) "Engaging" in an enterprise within the purview of 8 CFR 212.8(b)(4) contemplates full-time engagement to an extent which demonstrates an assumption of risk and responsibility for the direction and and control of the enterprise.

(2) The labor certification requirement of section 212(a)(14) of the Immigration and Nationality Act, as amended, is inapplicable to an alien who establishes that he is seeking to enter the United States with the *bona fide* primary purpose of engaging in an enterprise in which he has already invested or is presently investing a substantial amount of capital. Hence, an applicant for adjustment of status under section 245 of the Act who in good faith has invested $18,000 in a retail shoe business which he manages and directs full-time is not within the purview of section 212(a)(14) of the Act, notwithstanding the fact that he also performs the duties of cashier in the store.

(3) A request for a labor certification exemption as an investor filed prior to February 12, 1973, the effective date of the amendment of 8 CFR 212.8(b)(4) (38 F.R. 1379), may be decided under either the regulation as amended on that date or as it existed prior thereto, which ever is more favorable to the alien.

Matter of Ko

ON BEHALF OF APPLICANT:

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This case comes forward on certification for decision by the Deputy Associate Commissioner, Travel Control. The District Director on January 18, 1973, denied the application on the ground that the applicant is subject to the requirement of section 212(a)(14) of the Immigration and Nationality Act, as amended, does not have the labor certification for which that section provides, and is therefore inadmissible to the United States for permanent residence. The Regional Commissioner, to whom the District Director certified his decision, affirmed the denial and in turn certified his decision here.

The adjustment application in this case was filed in June, 1971, at which time the applicant alleged that although he is an intending nonpreference immigrant, he is not within the class of aliens excludable from admission under section 212(a)(14) of the Immigration and Nationality Act, as amended, because as an "investor" and by regulation (8 CFR 212.8(b)(4)) he is not required to obtain the otherwise prescribed labor certification. Section 212(a)(14) describes as ineligible for visas and for admission to the United States:

> (14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who

> are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of workers in the United States similarly employed. The exclusion of aliens under this paragraph shall apply to special immigrants defined in section 101(a)(27)(A) (other than the parents, spouses, or children of United States citizens or of aliens lawfully admitted to the United States for permanent residence), to preference immigrant aliens described in section 203(a)(3) and (6), and to nonpreference immigrant aliens described in section 203(a)(8); . . . (8 U.S.C. 1182(a)(14).

The regulation (8 CFR 212.8(b)(4)), as it was when this adjustment application was filed, read:

> (b) *Aliens not required to obtain labor certifications.* The following persons are not considered to be within the purview of section 212(a)(14) of the Act and do not require a labor certification: . . . (4) an alien who will engage in a commercial or agricultural enterprise in which he had invested or is actively in the process of investing a substantial amount of capital.

The applicant has testified that he is in the business of selling new shoes and that he has a retail store for this purpose in Huntington Park, California. He has presented evidence that he started this business in February, 1971, with an initial investment of $18,000, the pro-

ceeds from the sale of a grocery market which he previously owned and operated for a year in Argentina. With that money he leased premises for his present retail business, fitted them out with furniture and fixtures, secured occupancy and seller's permits, and purchased stock in trade; and he now has one full-time and one part-time employee working in the business besides himself. He oversees, manages and directs this enterprise, monitors, and purchases its stock, and works as well as the cashier in the store.

The District Director in his decision states that the law is clear and without qualification in requiring a labor certification of a nonpreference immigrant who will be performing skilled or unskilled labor; that the work of a cashier is such labor, and that to perform it the nonpreference immigrant must have the Secretary of Labor's certification notwithstanding any investment he may have made; and that since a valid regulation may not go beyond the scope of the law it implements, the regulation here must be read as restricting its benefits solely to the investor described therein who will not be performing skilled or unskilled labor in the United States. I believe that this is an unnecessarily rigid interpretation of section 212(a)(14).

It is certainly clear, as the District Director and Regional Commissioner indicate, that section 212(a)(14) was included in the law to assure protection for American labor from alien workers who would offer unwarranted competition. The House Committee on the Judiciary in recommending the passage of H.R. 2580, which contained what was to become the present section 212(a)(14), stated that it would assure among other things:

> Safeguards to protect the American economy from job competition and from adverse working standards as a consequence of immigrant workers entering the labor market. (House Report No. 745, 89th Congress, 1st Session, August 6, 1965, page 18).

The Committee observed also that:

> Section 212(a)(14) of the Immigration and Nationality Act is restated so as to require an affirmative finding by the Secretary of Labor that any alien seeking to enter the United States as a worker, skilled or otherwise, will not replace a worker in the United States nor will the employment of such alien adversely affect the wages and working conditions of individuals in the United States similarly employed. This required certification will be applicable to special immigrants (other than the parents, spouses, and minor children of U.S. citizens or permanent resident aliens), preference immigrants described in section 203(a)(3) and (6) and the nonpreference immigrants. (*id.*, page 21).

In considering all of this it is not unreasonable to conclude that it was not the purpose of Congress in this section to discourage an alien's bona fide effort to establish and conduct his own business here, where his stake in that business is to be substantial and irrevocably committed, and where there are encouraging prospects for its success. It cannot be said in any real sense that the applicant's employment in a job that did not exist before he made his investment is unfairly competitive with American labor. His employment in his own busi-

ness is not the "job competition" which the Congress wished to protect against. His conduct of his business does not "replace a worker in the United States" or "'adversely affect the wages and working conditions of individuals in the United States similarly employed." His efforts have in fact created jobs for two American residents.

It is my opinion, therefore, that Congress did not intend the provisions of section 212(a)(14) to be applicable to the alien who can establish that he is seeking to enter the United States with the bona fide, primary purpose of engaging in an enterprise in which he has already invested or is presently investing a substantial amount of capital. The regulation's requirement that the alien must have the intention of engaging in the enterprise in which he has invested or is investing is deliberate. Its object is to have him participate full-time in that enterprise, thereby assuring that he does not evade the certification requirement of section 212(a)(14) by merely making the investment and then devoting no effort or only part-time effort to the enterprise, while being employed elsewhere in competition with American workers. The regulation contemplates that the investor's "engaging" in the enterprise will be to an extent which demonstrates an assumption of risk and responsibility for its direction and control. If he is engaged full-time to the extent indicated above—and I find that the applicant here is—it is immaterial what his nominal job in the enterprise may be.

Before leaving this matter, some observations on related aspects should be made. Between the District Director's decision of January 18, 1973, and the Regional Commis-

sioner's determination on February 22, 1973, a changed text of the relevant regulation (8 CFR 212.8(b)(4)) became operative: In order to further clarify the rule, there were published on January 12, 1973 (38 F.R. 1379), to become effective on February 12, 1973, requirements that the minimum capital investment be $10,000 and that the alien establish that he has had at least one year's qualifying experience or training. So the regulation now provides that the certification exemption is available to:

> An alien who establishes on Form I-526 that he is seeking to enter the United States for the purpose of engaging in a commercial or agricultural enterprise in which he has invested, or is actively in the process of investing, capital totaling at least $10,000, and who establishes that he has had at least 1 year's experience or training qualifying him to engage in such enterprise.

It has been administratively determined by the Service that any request for labor certification exemption as an "investor" filed previous to February 12, 1973, may be decided under either the current or previous regulation, whichever is more favorable to the alien. In his decision affirming the denial in the present case, and by way of dictum, the Regional Commissioner has stated that the applicant here would not qualify under the experience requirement of the present regulation either. He bases this conclusion on the holding apparently that self-employment in his grocery business in Argentina is different substantially from self-employment in a retail shoe store in the Los Angeles metropolitan area. With respect to that I would say the experience necessary to qualify under the present regulation need not be in the same kind of business.

The Service obviously is in no position to predict that the investor's enterprise will succeed. It may fail and force the investor to seek employment elsewhere and in competition with U.S. resident workers. The regulatory requirement that he establish that he has had at least one year's experience or training qualifying him to engage in the enterprise is designed to give the Service some further measure of assurance that he has at least the "know-how" to participate meaningfully in the operation of the enterprise which then presumably would have a reasonable chance to succeed. When a difference exists between the nature of the business in which the alien was previously engaged and that of the business in which he is now investing or has invested in the United States, he may be able to establish that his previous experience or training as an entrepreneur or manager for a year or more meets the experience or training requirement of the regulation.

The present application will be returned to the District Director for further consideration not inconsistent with the above.

ORDER: IT IS ORDERED that the application be remanded to the District Director for disposition in conformity with this opinion.

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Form 280 A-Affidavit of Service by Mail
Rev. 12/75

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4141

Marian J. Bryant being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 27th day of September, 1976 she served two copies of the within Brief and Appendix for Respondent

by placing the same in a properly postpaid franked envelope addressed:

Lebenkoff & Coven, Esquires
One East 42nd Street
New York, New York 10017

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Marian J. Bryant

Sworn to before me this
27th day of September, 1976

Pauline P. Trola

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978